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Supreme Court, U. S.
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No. 98-697

In The

Supreme Court of the United States

October Term, 1998

HARBERT/LUMMUS AGRIFUELS PROJECTS, ET AL.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF

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12 pp

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ARGUMENT

The cases cited by Harbert/Lummus in the Petition for Writ of Certiorari are directly on point in this proceeding and demonstrate a clear conflict between and amongst the United States Courts of Appeal and the United States Supreme Court. The government's entire argument hinges on whether the government contracting officer ("CO") had the authority to enter into the subject agreement with Petitioners for completion of the Agrifuels Project. The government argues that the CO did not have or exercise such authority simply because the CO did not document the action in writing.[1] The government's argument that the CO lacked authority to bind the government is based on the CO's failure to execute a "prior written approval" for any such action, as required by the CO's delegation of authority (Pet. App. at 111-12). In sum, the government's sole objection to the existence of an authorized contract to continue to guarantee funding for the Agrifuels Project is the lack of a writing.

The cases cited by Petitioners support the proposition that the mere lack of a writing, even if required by statute, is an insufficient basis for denying the formation of an implied-in-fact contract where one party has performed in reliance on the government's oral promise and

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[1] The government asserts the lack of a writing as the basis for rejecting contract formation as well as contract ratification. Contrary to the implication of the government, the trial court found that the CO "adopted" the promise in question, which was made in his presence by the DOE programming official. (Pet. App. at 49.) The trial court's findings of fact are not disputed. (*See* Pet. App. at 67.) As discussed in greater detail below, the *Clark* line of cases establish that recovery on an implied-in-fact contract is available notwithstanding the absence of a written contract or ratification.

the government has accepted the benefits of that performance. Pursuant to long-standing case precedent established by the United States Supreme Court and followed by other federal courts, the government may not accept and retain the benefits of a contract, yet avoid paying for those benefits because the otherwise valid contract is deemed unauthorized or unenforceable on account of the government's failure to make a writing documenting or approving its promise to pay. Contrary to the government's assertions in this proceeding, *quantum meruit* is not argued as a separate theory of recovery, but rather as the measure of damages that have been awarded where a contractor wholly or partially performs its end of an oral agreement with the federal government, and the government thereafter reneges on its promise.

I. *CLARK V. UNITED STATES* HOLDS THAT AN IMPLIED-IN-FACT CONTRACT WARRANTS RECOVERY OF THE VALUE OF THE BENEFIT CONFERRED

In *Clark v. United States*, 95 U.S. 539 (1877), the Supreme Court of the United States recognized that even though a government contract was not in writing as required by an Act of Congress,[2] a party is entitled to recover the fair value of the property or services it conferred on the government by virtue of its performance of the oral agreement.

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[2] The Act of June 2, 1862, "An Act to Prevent and Punish Fraud on the Part of Officers Intrusted with the Making of Contracts for the Government," required that all contracts with the United States be in writing and made it "unlawful for contracting officers to make contracts in any other way than by writing signed by the parties." *Clark*, 95 U.S. at 541-42.

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

Clark, 95 U.S. at 542. In its brief, the government mischaracterizes *Clark* as an "implied-in-law" contract case. (*See* Gov. Br. at 11-14 & n.8.) Contrary to the government's suggestion, the Supreme Court did *not* hold that Clark's recovery was based upon an implied-in-law contract. Rather, the facts in *Clark*, as in the case *sub judice*, established a "parol contract," which is synonymous with an "implied-in-fact contract."[3] The Court's reference to *quantum meruit* merely established that the measure of

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[3] Other courts have interpreted *Clark* to stand for the imposition of liability based upon an implied-in-fact contract. *See, e.g., PacOrd, Inc. v. United States*, 139 F.3d 1320, 1322 n.1 (9th Cir. 1998) ("[*Clark v. United States*, 95 U.S. 539 (1877)] recogniz[ed] that although a statute requiring a writing precluded recovery based completely on an express oral contract, recovery was available on an 'implied contract.' "); *Narva Harris Constr. Corp. v. United States*, 574 F.2d 508, 510-12 (Ct. Cl. 1978) ("The Supreme Court, in discussing a statutory predecessor to § 200, recognized the possibility of recovery outside of the oral express contract which had not been reduced to writing. In *Clark v. United States*, 10 Ct. Cl. 604 (1874), *rev'd*, 95 U.S. 539 (1877), the Court of Claims had taken exactly the position which the Government now asserts and had denied recovery to a claimant against the Government on an oral contract. The Supreme Court, though recognizing that application of the statute was mandatory insofar as it precluded recovery based solely on an alleged express oral contract, reversed this court and allowed recovery on 'an implied contract for a *quantum meruit*.' Since that early interpretation . . . this court has often allowed recovery on an implied-in-fact contract.") (citation omitted).

damages available to Clark was the value of the goods or services rendered, which was the measure applied by the Court of Federal Claims in this case.

Here, as in *Clark*, the government argues a lack of authority of the contracting officer or government official to enter into a binding government contract based solely on the lack of a writing. (*See* Gov. Br. at 7-9.) In the present case, the Federal Circuit accepted the government's argument and reversed the trial court by narrowly focusing on the issue whether the government's promise or ratification thereof was documented in writing in accordance with delegated authority under the BEA. (*See* Gov. Br. at 7-9.) However, as discussed more fully in the Petition, the appellate court's decision directly conflicts with the Supreme Court precedent established in *Clark*. The *Clark* Court held that despite noncompliance with a statutory writing requirement, an oral promise made by the government that induces the promisee to perform entitles the promisee to compensation for the value of the benefit conferred. 95 U.S. at 542.

The relevance of the *Clark* Court's holding to this case is its refusal to characterize the absence of a writing as a limitation on the CO's authority to create an obligation for the federal government, and its characterization of the government's promise as an implied-in-fact contract, such as that found by the court in this case. In the present case, the trial court's uncontroverted findings of fact establish that an implied-in-fact contract was created when Harbert/Lummus was induced to and, in fact, did perform certain construction services in reliance on the government's oral promise. On these grounds, the trial court correctly ordered the government to compensate Harbert/Lummus for the value of the benefit conferred.

The government's suggestion that this Court may not consider *Clark* in ruling on the instant request for writ of certiorari because Petitioners have not stated a claim for *quantum meruit* is unfounded.[4] (*See* Gov. Br. at 11-14.) Petitioners asserted a claim for breach of an implied-in-fact contract in their initial complaint filed with the Court of Federal Claims. (Pet. App. at 1.) As indicated above, and as evidenced by the trial court's findings of fact,

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[4] See *Narva Harris* for an explanation of the difference between "implied-in-fact" and "implied-in-law" contracts and for a discussion on the implied-in-fact contract theory of recovery. 574 F.2d at 510-11 & n.6 ("Were we to subscribe to [the Government's argument], we would be facing the farcical situation of having the Government, in any situation where it was defending against an implied-in-fact contract claim, attempting to prove that there was, in actuality, an express oral contract which it had breached. Then, citing § 200 and applicable regulations, the Government could escape any liability whatsoever. Even more importantly, such an interpretation would also, in practicality, have the effect of eliminating recovery against the Government in almost all cases where claims are based on implied-in-fact contract or *quantum meruit*. In almost all such cases, there is some sort of oral representation on the part of some Government agent. Although the party seeking to recover from the Government may not rely on the oral representation, and may rely totally on other, independent facts to establish the presence of an implied-in-fact contract or to recover in *quantum meruit*, the Government now seeks to make the mere existence of the oral representation, characterized as an oral express contract not reduced to writing, sufficient to compel this court to close its eyes to all other surrounding facts. Clearly such an expansive interpretation of § 200 is unacceptable. . . . The failure, for whatever reason, of an attempt at an express contract be it written or oral, is not enough, in itself, to deprive a party of a recovery for breach where sufficient additional facts exist for the court to infer the 'meeting of the minds' necessary to separate an implied-in-fact from a pure implied-in-law contract.") (citations omitted).

Petitioners have established that the circumstances of this case prove the formation of an implied-in-fact contract, and that Harbert/Lummus is entitled to recover the value of the services rendered. Moreover, this Court addressed and disposed of this very same argument when proffered by the government in the *Clark* case:

> If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

95 U.S. at 543.

Finally, the government's assertion that it has not had any opportunity to present evidence as to the value of the services rendered by Harbert/Lummus is likewise unsupportable. (*See* Gov. Br. at 13-14.) In its brief, the government asserts that "the value to the government of any services the government may have received from petitioners' performance" somehow equates to the value of the ethanol plant constructed, taking into consideration its end use or disposition by the government. (*See* Gov. Br. at 13.) Contrary to the government's assertion, the measure of recovery on such an implied-in-fact contract is not the value of the benefit ultimately realized by the government, but rather the fair market value of the benefit actually conferred.[5] In other words, the value of

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[5] *See Martin v. Campanaro et al.* for a discussion on the measure of damages available in "implied-in-fact" versus "implied-in-law" contract cases. 156 F.2d 127, 130 & n.5 (2d Cir. 1946) ("**We think that here there was a contract 'implied-in-fact' to pay the reasonable value of the services.**") (citing

Petitioners' performance is not to be measured by the value to the government of the plant or project on which it worked, but rather by the fair market value of the construction services, including material and labor, actually supplied.

Absent a finding of fraud, the contract price constitutes substantial evidence, and arguably an admission by the government, of the value of the services rendered.[6] In

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Costigan, Implied-In-Fact Contracts, 33 Harv. Law Rev. 376, 387 (1920) ("See Costigan for the suggestion that both (1) 'meeting of the minds implied-in-fact contracts' and 'no-meeting-of-the-minds implied-in-fact contracts' are to be distinguished from (2) quasi contracts by the difference in the respective measures of damages; he says that in (1) the damages are on the contract basis, i.e., the loss to the plaintiff, but that in (2) the damages are measured by the unjust enrichment of, or benefit to, the defendant.") (emphasis added) (citation omitted). *See also Williams v. United States*, 127 F.Supp. 617, 623 (Ct. Cl. 1955) ("The sole defense of the [government] is that since [the government agent] was not a contracting officer with full authority to bind the Government in the fullest contractual sense, the plaintiffs cannot recover on this item. . . . It seems incredible that [the contracting officer] did not know all about the agreement and by his inaction ratify it. Certainly he did not repudiate the agreement, and he did not appear as a witness. The plaintiffs carried out their part of the agreement for which the Government received the benefit. **We feel that there then arose an implied contract under which the defendant was obligated to pay the value of the services rendered by the plaintiffs. Recovery is accordingly allowable for this item in the amount deducted under the contract.**") (emphasis added).

[6] *See Clark*, 95 U.S. at 543 ("This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose."); *cf. Crocker v. United States*, 240 U.S. 74, 82 (1916) ("The insistence proceeds upon the theory that the contract

fact, use of the contract price as the mechanism for measuring the value of the services rendered was agreed on by the parties in the proceedings before the trial court: "The parties agree that it is appropriate to utilize the monthly Construction Monitor Progress Report as a measure of the value of work performed." (Pet. App. at 157.) Both parties had an opportunity to put on evidence as to the value of Harbert/Lummus' construction services before the Court of Federal Claims. The trial court awarded $2,870,768, plus interest, based on the actual work performed by Petitioners after, and in reliance on, the government's promise, using the milestone and payment schedule contained in the construction contract. (Pet. App. at 157-61.) Therefore, the trial court did in fact apply the measure of damages the *Clark* Court said to apply in a case such as this.

II. *PACORD, INC. V. UNITED STATES* HOLDS THAT A GOVERNMENT PROMISE IS NOT INVALID OR UNAUTHORIZED FOR MERE LACK OF A WRITING

The government's view that *PacOrd, Inc. v. United States*, 139 F.3d 1320 (9th Cir. 1998), is inapposite because it is based strictly on the lack of a writing is curious given that the lack of a writing is the crux of the government's defense in the present case. (*See* Gov. Br. at 7-10.) The government's argument strictly relies on the absence of a writing documenting or ratifying the oral agreement

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price was in the nature of an admission by the government of the value of the [goods]. However this might be in other circumstances, it is wholly inadmissible here, for the fraud with which the contract was tainted completely discredited the contract price, and prevented it from being treated as an admission of the value by the government.").

between Petitioners and the government as the basis for finding a lack of authority to contract. (*See* Gov. Br. at 7-9.) The government attempts to distinguish the facts of the instant case from those in *PacOrd* by referencing the very same cases the Ninth Circuit found inapposite. (*See* Gov. Br. at 10.) The cases cited by the government are cases in which "the government was not contractually bound because the government agent had no contracting authority or exceeded what authority he had," or cases that "did not involve implied-in-fact contracts." *PacOrd*, 139 F.3d at 1323. The government officials in those cases exceeded the scope of their contracting authority by engaging in transactions for which they had no such authority, not by merely failing to document authorized acts in writing. *See id.* (distinguishing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Edwards v. United States*, 22 Cl. Ct. 411 (1991); *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110 (9th Cir. 1994); *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077 (Fed. Cir. 1989)).

In *PacOrd*, the Ninth Circuit held that an oral promise by the government to guarantee payment to a subcontractor was not necessarily invalid and unenforceable merely because the government failed to reduce the promise to writing as required by the governing statute or regulation. 139 F.3d at 1322-23. The *PacOrd* court found that the oral promise made by a government contracting officer to PacOrd, the subcontractor, that the government would guarantee payment by the contractor may have created an enforceable implied-in-fact contract, despite noncompliance with the writing requirement in the Federal Acquisition Regulation ("FAR"). *Id.* The Ninth Circuit observed:

> Implied-in-fact contracts with the government have been enforced despite statutory or regulatory requirements that contracts be in writing. . . . The present case is analogous to Narva Harris. In both cases the government made assurances to a service provider in order to secure the desired performance. In neither case did the parties execute written contracts as required. And, PacOrd, like Narva Harris Construction, proceeded and completed its work in reliance on the government's assurances. Thus, PacOrd, like Narva Harris Construction, should be permitted to establish at trial, the existence of an implied-in-fact contract. If PacOrd can do so, recovery is not barred by the FAR requirement that the contract must be in writing.

Id. (quoting *Narva Harris Constr. Corp. v. United States*, 574 F.2d 508, 511 (Ct. Cl. 1978)).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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